

J. Maeder



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: KIME Enterprises, Inc.--Request for Declaration
of Entitlement to Costs

File: B-241996.5

Date: December 9, 1991

Edward W. Mitura for the protester.
Herbert F. Kelley, Jr., Esq., and Jack B. Patrick, Esq.,
Department of the Army, for the agency.
Jacqueline Maeder, Esq., and Paul Lieberman, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

Protester is not entitled to award of the costs of filing
and pursuing its protest where the agency took corrective
action approximately 1 month after the issuance of General
Accounting Office's decision with respect to a recently
imposed certification requirement, and the decision provided
the first interpretation establishing the necessity for the
corrective action taken by the agency.

DECISION

KIME Enterprises Inc. requests that our Office declare the
firm entitled to recover the reasonable costs of filing and
pursuing its protest and its bid preparation costs with
respect to invitation for bids (IFB) No. DABT64-91-B-0001,
issued by the Department of the Army for food services at
Fort Chaffee, Arkansas. The protest, filed May 16, 1991,
challenged the terms of the IFB and argued that the
Certificate of Procurement Integrity which was required to
be completed and submitted by bidders was deficient for
failure to provide a signature line.

On June 24, because of the defective Certificate of Procure-
ment Integrity, the Army decided to cancel the protested
solicitation and resolicit. The Army based this determina-
tion on our decision in Shifa Servs. Inc., B-242686, May 20,
1991, 70 Comp. Gen. ___, 91-1 CPD ¶ 483, in which we found
that an agency's failure to provide a separate signature
line for a Certificate of Procurement Integrity rendered a
solicitation ambiguous as to the precise manner by which
bidders were to certify compliance with requirements

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concerning procurement integrity, and recommended that cancellation and resolicitation was appropriate in those circumstances. We subsequently dismissed KIME's protest as academic.

On July 12, the protester filed a claim with our Office under section 21.6(e) of our revised Bid Protest Regulations, 56 Fed. Reg. 3759 (1991), (to be codified at 4 C.F.R. § 21.6(e)), for the costs of filing and pursuing its protest, and also requesting its bid preparation costs. Pursuant to the revised regulations, if the contracting agency decides to take corrective action in response to a protest, we may declare the protester to be entitled to recover reasonable costs of filing and pursuing its protest, including attorneys' fees.


Prior to this revision of our regulations, we did not award costs in cases where an agency took corrective action prior to our issuing a decision on the merits of the protest. We became concerned, however, that some agencies were taking longer than necessary to initiate corrective action in the face of meritorious protests, thereby causing protesters to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. We believed that providing for the award of costs in cases where the agencies delayed taking corrective action would encourage agencies "to recognize and respond to meritorious protests early in the protest process." 55 Fed. Reg. 12834, 12836 (1990).

As initially proposed, section 21.6(e) would have provided for the award of costs in cases where the agency notified us of a decision to take corrective action after the due date for submission of the agency report on the protest. 55 Fed. Reg. 12838. As adopted, section 21.6(e) provides for the possible award of costs without regard to the report due date. We stated in the explanatory material accompanying the promulgation of the final regulations that deciding whether to award costs was more appropriately based on the circumstances of each case, including when in the protest process the decision to take corrective action was made and communicated to us and to the protester, rather than on the report due date. We noted in this respect that there may be circumstances where the award of costs, even where corrective action was taken after submission of the report, would not be justified, just as there may be circumstances where the award of costs would be appropriate even where corrective action was taken prior to report submission. See 56 Fed. Reg. 3759 et. seq.

It was not our intention in adopting the revised provision to award protest costs in every case in which an agency takes corrective action in response to a protest. Since our

concern was that some agencies were not taking corrective action in a reasonably prompt fashion, our intent is to award costs where, based on the circumstances of the case, we find that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. Here, the protest issue--the effect of the inclusion in an IFB of a Certificate of Procurement Integrity which provided no signature line--was an unsettled area of the law with respect to the recently imposed certification requirement, which our Office first addressed in the Shifa decision. Approximately 1 month after the date of issuance of the Shifa decision, which established that the defective certificate rendered the IFB ambiguous, the Army took the appropriate corrective action in this case. Such action is precisely the kind of prompt reaction that our regulation is designed to encourage. It provides no basis for a determination that the payment of protest costs is warranted. Accordingly, KIME's request for a declaration of entitlement to costs is denied. See Leslie Controls Inc.--Claim for Costs, B-243979.2, July 12, 1991, 91-2 CPD ¶ 50.

Regarding Kime's request for recovery of its bid preparation costs, our revised regulations provide no basis for allowing the recovery of such costs in these circumstances, and KIME would not be entitled to these costs under any circumstances since it will have the opportunity to compete for the contract under a resolicitation. See Microlog Corp., B-237486, Feb. 26, 1990, 90-1 CPD ¶ 227.


for James F. Hinchman
General Counsel